



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CRIMINAL APPEAL NO 50 OF 2017**

**DANIEL NGEER JOHN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 627 of 2016**

**in the Senior Principal Magistrate's Court at Wundanyi**

**by Hon N. N. Njagi (SPM) on 2<sup>nd</sup> June 2017)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant herein, Daniel Ngeer John, had initially been charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code Cap 63 (Laws of Kenya). The Charge Sheet was subsequently amended and he was charged with the offence of house breaking and committing a felony contrary to Sections 304 (a) of the Penal Code.
2. The particulars of this charge were that on the night of 29<sup>th</sup> and 30<sup>th</sup> November 2016 at an unknown time at Peleleza Village in Mwatate Township within Taita Taveta County, jointly with others not before the court, he broke and entered a building namely a yard of World Vision Kenya and stole their three (3) Motor Cycles Registration Numbers KMCZ 691F Yamaha DT 175, KMCC 910J Yamaha DT 175 and KMCC 873A Yamaha DT 175 all valued at Kshs 1,500,000/=.
3. He had also been charged with an alternative charge of handling stolen property contrary to Section 322 (2) of the Penal Code. The particulars of this offence were that on 30<sup>th</sup> November 2016 at Saliata Taita Taveta County, otherwise than in the course of stealing, dishonestly retained one (1) Motor Cycle Registration Number KMCC 910J Make Yamaha DT 175 white in colour knowing or having reason to believe them to be stolen good (**sic**).
4. The Learned Trial Magistrate, Hon N.N. Njagi (SPM), convicted him on the alternative charge and sentenced him to serve six (6) years imprisonment. He was, however, acquitted on the main charge.
5. Being dissatisfied with the said judgment, on 29<sup>th</sup> June 2017, the Appellant filed a Notice of Motion application seeking leave to be allowed to file an Appeal out of time, which application was allowed and the Petition of Appeal deemed to have been duly filed and served. He relied on six (6) Grounds of Appeal.

6. Subsequently on 21<sup>st</sup> September 2017, he filed Amended Grounds of Appeal and Written Submissions. This time he relied on two (2) Grounds of Appeal. His Written Submissions were also filed on the same date. The State's Written Submissions were dated and filed on 8<sup>th</sup> November 2017. He informed this court that he did not wish to respond to the said State's Written Submissions.

7. When the matter came up on 9<sup>th</sup> November 2017, both parties asked this court to deliver its Judgment based on their respective Written Submissions. This Judgment is therefore based on the said Written Submissions.

## **LEGAL ANALYSIS**

8. As this is a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of **Odhiambo vs Republic Cr App No 280 of 2004 (2005) 1 KLR** where the Court of Appeal held that:-

**“On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour”.**

9. It appeared to this court that the only issue that had been placed before it for determination was:-

### **a. Whether or not the Appellant's rights to fair trial were infringed upon.**

10. It was apparent that the Appellant abandoned his initial grounds of appeal regarding the question of whether or not the Prosecution had proved its case against him beyond reasonable doubt. This court therefore dealt with the two (2) issues it had identified hereinabove under the separate and distinct heads shown hereinbelow.

## **I. APPELLANT'S RIGHT TO FAIR TRIAL**

### **A. WITNESS STATEMENTS**

11. Amended Ground of Appeal No (1) was dealt with under this head.

12. The Appellant argued that the Prosecution did not disclose all the evidentiary materials it intended to rely upon. He contended that he was not supplied with the Witness Statements as had been directed by the Learned Trial Magistrate before the Charge Sheet was amended and that in any event the Witness Statements that he was to be furnished with related to the previous Charge Sheet. It was therefore his submission that his fundamental right under Article 50(2)(j) and Article 50 (2)(k) of the Constitution of Kenya, 2010 was breached.

13. On its part, the State argued that the Appellant never informed the Trial Court that he was never furnished with the Witness Statements and he could therefore not claim that his fundamental rights had been infringed upon.

14. A perusal of the proceedings shows that the Appellant was arraigned for the first time in court on 1<sup>st</sup> December 2016 before Hon E.G. Nderitu. He denied the charges and a plea of not guilty to the charge was entered. She directed that the matter be mentioned before the Learned Trial Magistrate on 6<sup>th</sup> December 2016 on which date he ordered that the Appellant be furnished with Witness Statements.

15. The matter came up in court on 20<sup>th</sup> December 2016, 4<sup>th</sup> January 2017, 12<sup>th</sup> January 2017 and 17<sup>th</sup> January 2017 and the Appellant never informed the Trial Court that he had not been furnished with the Witness Statements. The Charge Sheet was amended on 17<sup>th</sup> January 2017 and the Learned Trial Magistrate ordered yet again, that he be supplied with Witness Statements.

16. The matter also subsequently came up in court on 31<sup>st</sup> January 2017, 14<sup>th</sup> February 2017, 28<sup>th</sup> February 2017, 14<sup>th</sup> March 2017, 23<sup>rd</sup> March 2017, 6<sup>th</sup> April 2017 and on 11<sup>th</sup> April 2017 when the matter proceeded for hearing for the first time. On all those days, the Appellant never informed the Trial Court that he had never been furnished with the Witness Statements and in fact, Cross-examined witnesses.

17. This court was therefore not persuaded to find that the Appellant's right to fair trial was infringed upon for the reason that he never complained that he was never supplied with witness statements. He could not purport to complain after the trial had been concluded.

18. In the circumstances foregoing, this court found no merit in Amended Ground of Appeal No (1) and the same is hereby dismissed.

## **B. RECALLING OF WITNESSES**

19. Amended Ground of Appeal was dealt with under this head.

20. The Appellant argued that after the Prosecutor amended the Charge Sheet on 4<sup>th</sup> May 2017, the Learned Trial Magistrate did not ask him if he wished to recall Basil Mwakulomba (hereinafter referred to as "PW 1"), Joseph Mwanyika Mwakichilo (hereinafter referred to as "PW 2"), Number 221937 Sergeant Abashola Komora (hereinafter referred to as "PW 3") and Number 21952 PC Jackson Mruttu (hereinafter referred to as "PW 4") who had already testified contrary to the provisions of Section 214 of the Criminal Procedure Code.

21. He maintained that the said Section provided that an accused person may demand that witnesses who have testified be recalled for Cross-examination but the Learned Trial Magistrate did not make such an order for recall. It was his submission that this occasioned him prejudice. He thus urged this court to allow his Appeal on this ground.

22. The State argued that it was not necessary to amend the Charge Sheet as regards time of commission of the offence by virtue of Section 214 (2) of the Criminal Procedure Code and hence it was not necessary to recall the witnesses for purposes of cross-examining them regarding the said time of commission of the offence. It submitted that the Charge Sheet was not defective as the amended time in the Charge Sheet did not substantially alter the charge or evidence needed to prove it because all it did was to clarify the time the offence was committed. It relied on the case of **Yongo vs Republic [1983] KLR 391** in this regard.

23. Section 214 of the Criminal Procedure Act Cap 75 (Laws of Kenya) provides as follows:-

**1. Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:**

**Provided that—**

**i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;**

**ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.**

**2. Variance between the charge and the evidence adduced in support of it with respect to the**

**time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.**

24. It was not clear from the proceedings what was being amended as the Prosecutor merely informed the Trial Court that he had an amended charge. This court picked the fact that the amendment on 4<sup>th</sup> May 2017 was in respect of time from the State's Written Submissions and not from what was in the proceedings in the lower court as the same were silent on what amendment was being effected.

25. Whereas as the State argued that the Charge Sheet need not be amended to reflect the time of the commission of the offence if the same was at variance with the evidence that has been adduced, the procedure after amendment of a charge sheet is clear.

26. The Appellant herein was entitled to be given an opportunity to Cross-examine the witnesses regarding the time the offence occurred as it was a material to the circumstances of the case herein. Notably, the Learned Trial Magistrate was under no obligation to order that PW 1, PW 2, PW 3 and PW 4 be recalled. This is because the onus fell squarely on the Appellant herein to seek their recall.

27. Having said so, this was a *pro se* matter. The Appellant was representing himself and being a layman in matters of law, he would never have known about the provisions of Section 214(1)(ii) of the Criminal Procedure Act so as to have demanded for the recall of PW 1, PW 2, PW 3 and PW 4 for Cross-examination as provided therein.

28. While appreciating that the Learned Trial Magistrate was under no obligation to alert him of the aforesaid provision and directed that hearing proceed immediately, this court was persuaded to find and hold that proceeding with the hearing immediately after an amendment had been made and after the Appellant had pleaded to the amended Charge, without giving him an opportunity to recall the witnesses who had testified greatly prejudiced him. Appreciably, the time of commission of the offence was a material fact which would have necessitated the Appellant to Cross-examine witnesses who had testified before the amendment on time was made.

29. Accordingly, having analysed the Written Submissions and case law that was relied upon by both parties, this court came to the firm conclusion that the circumstances of the case made Re-trial herein a good option to cure the irregularities in the Trial Court. Indeed, as an accused person's right to fair trial is also enshrined in Article 50 of the Constitution of Kenya, 2010 courts must not only look at the victim only. They must also take into account the rights of such accused person as the sword of justice cuts both ways.

30. In this regard, this court fully associated itself with the holdings in the cases of **Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481** and re-stated in **Fatehaji Manji vs Republic [1966] E.A. 343** that Mutende and Thuraniira Jaden JJ cited in the case of **Jackson Mutunga Matheka vs Republic [2015] eKLR** where it was stated as follows:-

**“... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused.”**

31. In the circumstances foregoing, this court found merit in Amended Ground of Appeal No (2) and the same is hereby allowed.

**CONCLUSION**

32. This court did not therefore address the merits or otherwise of this case and the sentence that was meted upon the Appellant herein so as not to embarrass the court that will hear the matter herein. The merits or otherwise of this case were best left to the Trial Court.

### **DISPOSITION**

33. For the foregoing reasons, this court's decision was that the Appellant's Petition of Appeal that was lodged on 27<sup>th</sup> June 2016 was partly successfully as was demonstrated hereinabove. As it was unsafe to allow his conviction to stand. The same is hereby quashed. Consequently, the sentence that was meted upon him by the Trial Court is also hereby set aside.

34. However, in view of the fact that an offence was alleged to have been committed, it is hereby directed and ordered that there shall be a Re-trial of the Appellant herein so that the matter can be heard on its own merits. He shall be arraigned afresh before a different magistrate at the Wundanyi Law Courts to hear and determine this matter.

35. In this regard, it is hereby directed and ordered that the Appellant remains in custody for production before the Senior Principal Magistrate Wundanyi Law Courts on 30<sup>th</sup> January 2018 for allocation of the hearing as aforesaid. It is the expectation of this court that the new trial court will proceed expeditiously as this will be a Re-trial.

36. It is so ordered.

**DATED and DELIVERED at VOI this 23<sup>rd</sup> day of January 2018**

**J. KAMAU**

**JUDGE**

In the presence of:-

Daniel Ngee John - Appellant

Miss Anyumba - for State

Susan Sarikoki- Court Clerk